No. 377

In The
United States Supreme Court

OCTOBER TERM, 1940

FRED SPIKES
Petitioner

versus

STREET & SMITH PUBLICATIONS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fifth Circuit

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TO THE HONORABLE, the CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Fred Spikes, a resident citizen of the State of Texas, respectfully presents this, his petition for Writ of Certiorari to the Circuit Court of Appeals of the United States for the Fifth Circuit to review a final judgment of said Circuit Court entered on June 12th, 1941, where it reversed a judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, and represents:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Street & Smith Publications, Inc., is a corporation domiciled in the State of New York, engaged in the business of publishing and selling weekly, semi-weekly, and

monthly magazines of the so-called "popular" or "pulp" type. Among these is a weekly publication known as "Western Story Magazine." These publications, including "Western Story Magazine," are printed by said corporation at Chicago, Illinois. These magazines are published with the expectation and intention upon the part of the corporation that they will be distributed and sold in every State of the United States and many foreign countries. They are distributed and sold in every State, including the State of Texas, under a contract styled "Wholesale Distributors Contract" a copy of which appears on pages 26 to 31 inclusive of the Record.

In the issue of September 24th, 1938, of said "Western Story Magazine" appeared an article (R. 3-4) designating petitioner, Fred Spikes, as an outlaw and cattle rustler, and as one of those who "after some gun battles that are classics in Western History * * * hid in caves and lived on prairie dogs and traveled only on dark nights as they hightailed out of the country."

Alleging such article to be libelous as to him, petitioner filed suit in a district court of the State of Texas, which respondent removed upon petition and bond to the District Court of the United States for the Northern District of Texas, Lubbock Division. Respondent sought to quash the jurisdiction upon the ground that it was not present in the State of Texas, and consequently not suable in that State. (R. 47.) The District Court overruled this motion (R. 51) and the case proceeded to trial on the merits. Upon such trial Petitioner recovered judgment in the amount of $3000.00. (R. 176.)

Upon appeal, the Circuit Court of Appeals for the Fifth Circuit held that Respondent's motion to quash the

jurisdiction was well taken because "appellant was not doing business in Texas, so as to be present there," and reversed the case with directions to sustain Respondent's pleas to quash jurisdiction.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The single question involved is whether or not, under the facts of this case which are undisputed, Respondent, Street & Smith Publications, Inc., in conducting its business in the manner it did within the State of Texas, was doing business within that State so as to be present there, so that service upon its Agent within the State of Texas subjected it to the jurisdiction of a District Court of the United States within that State.

Respondent's publication concerning petitioner was libelous, per se. It described him as a cattle thief and outlaw. Respondent's domicile is the State of New York. It prints its magazines in the State of Illinois. It delivers its magazines by express and mail to every state in the United States. It is not controverted that the magazine in which the libelous publication was made was published by Respondent with the express purpose and intent that it should be distributed, circulated and sold within the State of Texas. 3165 Copies were distributed, circulated and sold within the State of Texas. Respondent's distribution of the libelous publication in Texas was under a contract with K. H. Page, a citizen of Texas, domiciled at Fort Worth, in that State. This contract is styled "Wholesale Distributors Contract," and provides among other things that Respondent retains title to its magazines until they are disposed of by retailers, or the covers on returns destroyed. It contains every element necessary to create agency, including an express designation of him as "agent of the company." (R. 26-31.)

The holding of the Circuit Court of Appeals that under these facts Respondent was not doing business within the State of Texas so as to be present there, presents a question of federal procedure, which has not been (as pertains to the publication of libelous matter) heretofore determined, but which should be determined by this Court. The matter of whether or not under similar methods of operation foreign corporations are doing business within a State so as to be present there, and amenable to suit in the courts of such State by service upon its agent within the State, has been heretofore determined by this Court in WILCOX & GIBBS SEWING MACHINE COMPANY V. EWING, 141 U. S. 627, 35 L. Ed. 882; and INTERNATIONAL HARVESTER COMPANY OF AMERICA V. KENTUCKY, 234 U. S. 579, 58 L. Ed. 1479, in favor of jurisdiction, and Petitioner represents that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of the Supreme Court in the cited cases.

WHEREFORE, for the reasons set forth herein, as well as in the supporting brief hereto annexed, Petitioner respectfully prays this Court to issue its Writ of Certiorari to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding it to forthwith send up a full and complete transcript of the record; that all proceedings be certified to this Court, and that this cause be reviewed and the manifest errors of the Circuit Court of Appeals be revised and corrected as provided by law; that upon hearing by this Honorable Court the judgment of the Circuit Court of Appeals reversing this case with instructions to the District Court to sustain Respondent's pleas to quash the jurisdiction be reversed, and the judg-

ment of the District Court affirmed, and that such other and further proceedings be had herein as may be provided by law and equity.

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THE STATE OF TEXAS }
COUNTY OF LUBBOCK }

F. D. Brown, being duly sworn, says that he is of counsel for Fred Spikes, Petitioner in the foregoing petition for Certiorari; that he prepared the foregoing Petiton for Writ of Certiorari and that the allegations therein are true, and that there is just cause for same, as he verily believes.

F. D. BROWN

Subscribed and sworn to before me this this the 24th day of July, A. D. 1941.

EVELYN CAUGHRON
Notary Public, Lubbock
County, Texas.

(SEAL)